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provided such state extended a similar courtesy to New Yorkers, was held no palliative for the discrimination practiced in the absence of such hypothetical legislation in other states.¹⁸

The court could hardly have done otherwise than to take the situation as it was in the case before it. The wisdom of its conclusion admits of little, if any, doubt. No one would contend that New York might tax real estate of non-residents at its full value while it exempted wholly or partially that of residents. Such discrimination against a resident of New Jersey whose total assets consisted of New York realty could not be overlooked because other residents of New Jersey owned exempt realty elsewhere or owned intangibles which New York might have taxed but chose to treat more tenderly than those of New Yorkers. Such unfriendly treatment of a non-resident is too obviously unconstitutional to be attempted. The effort now frustrated plainly belongs in the same category.

T. R. P.

THE SHERMAN ANTI-TRUST LAW.—The United States Supreme Court held in the *Knight* case¹ that the formation of a corporation under the laws of New Jersey for the purpose of acquiring the stock of manufacturing corporations organized under the laws of Pennsylvania, which together had a practical monopoly, that is, a dominating control of their business in the United States, did not constitute an offense against the Anti-Trust Law, and that, therefore, the American Sugar Refining Company, organized for the purpose of securing this monopolistic control, could not be suppressed as an illegal combination in a suit brought by the United States Government under that law. This decision was concurred in by seven of the eight Justices who took part in it, Mr. Justice Harlan alone dissenting. The opinion of the majority was based upon the sound principle that Congress did not attempt by the Sherman Anti-Trust Law "to limit and restrict the rights of corporations created by the States or the citizens of the States in the acquisi-

¹⁸Even if this reciprocal provision were made operative by the requisite action of other states, it would afford no relief to non-residents whose total income is from New York and is not greater than the exemption allowed by their home state. If New Jersey copied the New York law, a married resident of New Jersey whose total income was \$2,000 earned in New York would pay no tax in New Jersey, and would therefore pay a New York tax on \$2,000, whereas by becoming a resident of New York he would pay nothing. Mr. Justice Pitney's reference to this reciprocal provision makes it doubtful whether he understood what its practical operation would be. He was correct in thinking that it would be no palliative for the discrimination in respect to personal and family exemptions, except in certain special cases, but he seems to have assumed that it was itself a discrimination until counterbalanced by the action of other states. On the contrary, it would, if added to a proper exemption provision, almost wholly relieve non-residents from a New York tax on New York income. It is therefore an act of grace designed to prevent or reduce bi-state double taxation of incomes. Viewed as a favor and not as a discrimination, it would appear to be properly conditioned on the grant of corresponding favors to New Yorkers by the home states of non-residents.

¹United States v. E. C. Knight Co. (1894) 156 U. S. 1, 15 Sup. Ct. 249.

tion, control, or disposition of property", and that Congress apparently had no power to do so.²

In the *Northern Securities* case³ it was held that the Northern Securities Company, organized for the purpose of acquiring the stocks of the Northern Pacific Railway Company and the Great Northern Railway Company, was an illegal combination and as such could be suppressed in a suit brought by the United States Government similar to the one which failed in the *Knight* case. Four of the nine Justices, Harlan, Brown, McKenna and Day, J. J., held broadly, in disagreement with the *Knight* case, that a combination of corporations engaged in Interstate Commerce could not be legally effected through the formation of a holding company any more than it could be legally effected by means of an agreement among the several corporations forming the combination. Mr. Justice Brewer, while concurring in the result, delivered an opinion, expressing his dissent from this broad principle. And he held that the Northern Securities Company could be suppressed because "a single railroad is, if not a legal, largely a practical, monopoly, and the arrangement by which the control of these two competing roads was merged in a single corporation broadens and extends such monopoly", and because the Northern Securities Company was "an unreasonable combination in the restraint of Interstate Commerce—one in conflict with State Law and within the letter and spirit of the statute and the power of Congress". Mr. Justice White delivered a convincing dissenting opinion, which was in accord with his opinion in the *Knight* case, and with him concurred the Chief Justice and Mr. Justice Peckham and Mr. Justice Holmes.

In the *Standard Oil* case⁴ the Court unanimously held that the Standard Oil Company, formed for the purpose of acquiring the control of a large number of manufacturing corporations, which together had a practical monopoly of the trade in petroleum and its products, was an illegal combination, involving an unreasonable and undue restraint of trade. But Mr. Justice Harlan delivered an opinion in accord with his opinion in the *Knight* case, expressing his dissent from the rule of reason (first suggested by Mr. Justice Brewer in the *Northern Securities* case and elaborated by Chief Justice White in this case) and holding that the Anti-Trust Law was aimed at the suppression of all contracts in restraint of trade and practical monopolies, whether reasonable or unreasonable. And in support of this dissent he cited the cases of *United States v. Freight Association*⁵ and *United States v. Joint Traffic Association*,⁶ which held that a contract between railroads for the maintenance of rates was illegal even though the rates maintained were themselves reasonable and the contract was entered into for the purpose of maintaining such reasonable rates.

²See *Northern Securities Co. v. United States* (1904) 193 U. S. 197, at pp. 402-6, 24 Sup. Ct. 436; 4 Columbia Law Rev. 315; 9 Columbia Law Rev. 95.

³*Northern Securities Co. v. United States* (1904) 193 U. S. 197, 24 Sup. Ct. 436.

⁴*Standard Oil Co. of N. J. v. United States* (1910) 221 U. S. 1, 31 Sup. Ct. 502.

⁵*United States v. Trans-Missouri Freight Ass'n.* (1897) 166 U. S. 290, 17 Sup. Ct. 540.

⁶*United States v. Joint Traffic Ass'n.* (1898) 171 U. S. 505, 19 Sup. Ct. 25.

In the *American Tobacco Company* case⁷ the Court in like manner unanimously held that the American Tobacco Company, formed for the purpose of acquiring the control of a large number of manufacturing corporations, which together had a monopolistic control of the trade in tobacco, was an illegal combination, and Mr. Justice Harlan delivered a similar dissenting opinion.

In each of these cases stress was laid, in the opinion of the Court, upon the illegal acts of the promoters prior to the formation of the combination, upon the continuance of illegal acts subsequent thereto, and upon the actual dominating control and influence of the combinations in question.

Finally, in the case of *United States v. United States Steel Corporation* (U. S. Supreme Court, Oct. Term, 1919, No. 6, March 1, 1920), the Court holds that the United States Steel Corporation, formed for the purpose of acquiring the control of a large number of manufacturing companies, mining companies and one railroad company, which together had a practical or dominating control of the iron business, is not an illegal combination. This decision was rendered by four of the nine Justices of the Court, Chief Justice White, and Holmes, McKenna and Van Devanter, J. J. A dissenting opinion was delivered by Mr. Justice Day, with whom concurred Mr. Justice Pitney and Mr. Justice Clarke. Brandeis and Reynolds, J. J., took no part in the decision.

It cannot be doubted, and is substantially conceded by the Court, that the United States Steel Corporation was formed with the intent and purpose to monopolize or restrain trade—that is, with the same intent and purpose with which the Northern Securities Company, the Standard Oil Company and the American Tobacco Company were formed. But the United States Steel Corporation escaped condemnation, because the evidence showed that apparently it had not acquired the monopoly which it sought, and that great as was its power to monopolize or dominate the iron and steel trade, it had not attempted to exercise that power. And stress was laid upon the fact that the conduct of its promoters prior to the formation of the combination and the conduct of its managers subsequent thereto was not characterized by those "brutalities and tyrannies" which, it is charged, were practiced by the promoters and managers of the Standard Oil Company and the American Tobacco Company, and, finally, that the United States Steel Corporation was on the whole promotive of the public welfare in the efficient management of its business, in the treatment of its employees, its customers and competitors and in the development of a large foreign trade. And in the last analysis the Court goes to the full limit of holding broadly that mere size or the mere existence of the power to control trade does not constitute an offense against the law, unless the power is exercised and manifested in overt acts, such as freight rebates, arbitrary reduction of wages, manipulation of prices and the crushing of competitors by unfair trade practices.

This, it must be conceded, leaves the meaning of the law far from definite and certain and makes it difficult for the lawyer to advise his clients as to its scope. This is emphasized by the announcement of the Attorney General that, notwithstanding this decision, he intends hopefully to continue the prosecution of all the anti-trust cases, including the suit against the American Sugar Refining Company. It would

⁷*United States v. American Tobacco Co.* (1910) 221 U. S. 106, 31 Sup. Ct. 632.

seem, however, that the American Sugar Refining Company stands as secure before the law as the United States Steel Corporation. For the business of the independent competitors of the so-called Sugar Trust has continued to thrive and the American Sugar Refining Company is doing today a substantially smaller percentage of the total business than it did at the time of its formation.

However, this decision leaves the meaning of the law not more indefinite and uncertain than many constitutional provisions, statutes and rules of law with which the courts have to deal. And it is doubtful whether anything would be gained if Congress should attempt to define by a hard and fast rule what a monopoly is. It is certain that if it had made such an attempt, it would have tried to prevent the organization of the United States Steel Corporation. And, yet, the United States Supreme Court has just declared that this corporation is a beneficent institution—a “good trust”, within the distinction laid down by the idol of the American people—Theodore Roosevelt.

Upon the basis of the decisions herein considered, it is submitted that the Sherman Anti-Trust Act is to be interpreted as follows:

First: Combinations possessing a monopolistic (dominating) control effected through the organization of large corporations, as well as contracts involving unreasonable restraints of trade or tending to monopoly, come within the Act.

This is contrary to the *Knight* case, and, in the opinion of the writer, contrary to a sound interpretation of the Act, but the *Knight* case was in effect overruled by the decision in the *Northern Securities* case.

Second: A combination effected through the medium of a large corporation is illegal, provided only that it exercises its monopolistic control unfairly and oppressively.

This is the rule of reason laid down by Chief Justice White in the *Standard Oil* and the *American Tobacco Company* cases, and consistently applied in the *United States Steel Corporation* case.

Third: Whether or not the combination is using its monopolistic control unfairly and oppressively and therefore involves an unreasonable restraint of trade is to be determined by a consideration of (a) the acts of its promoters prior to the formation of the corporation; (b) the acts of the managers of the enterprise subsequent thereto; (c) how far outside competition has been able to thrive or maintain itself since the formation of the combination; (d) the nature of the business and its relation to the public interest.

If the outside competition thrives, that is very good evidence that the Trust is not misusing its power, and if, in addition, it can be shown that there has been no undue reduction of wages, undue enhancement of prices or unfair practices as against competitors, it may be confidently asserted that the combination does not come within the condemnation of the Act.

G. F. C.

THE DISPOSITION OF INSURANCE MONEY WHEN THE BENEFICIARY MURDERS THE INSURED.—It is usually said that the beneficiary of an insurance policy who intentionally causes the death of the insured cannot recover in an action on the policy, but that the insured's administrator can recover the proceeds for the benefit of the estate on the theory of